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SEC

SERVICE DATE - APRIL 13, 2001

SURFACE TRANSPORTATION BOARD

DECISION

STB Finance Docket No. 33995

SF& L RAILWAY, INC.–ACQUISITION AND OPERATION EXEMPTION–TOLEDO,
PEORIA AND WESTERN RAILWAY, CORPORATION BETWEEN LA HARPE AND
PEORIA, IL

STB Finance Docket No. 33996¹

KERN W. SCHUMACHER AND MORRIS H. KULMER–CONTINUANCE IN CONTROL
EXEMPTION–SF&L RAILWAY, INC.

Dated: April 12, 2001

On January 10, 2001, SF&L Railway, Inc. (SF&L) filed a notice of exemption to acquire from Toledo, Peoria and Western Railway Corporation (TPW), an operating easement over, and the rail, ties, and improvements on, a 71.5-mile rail line extending between milepost 194.5 at La Harpe and milepost 123.0 at Peoria, IL. TPW will retain the realty underlying the line, subject to a permanent and unconditional easement to permit SF&L to fulfill its obligations as a railroad common carrier. SF&L will employ TPW as a contract operator but will retain responsibility for providing service. SF&L Railway, Inc.–Acquisition and Operation Exemption–Toledo, Peoria and Western Railway Corporation Between La Harpe and Peoria, IL, STB Finance Docket No. 33995 (STB served and published at 66 FR 9411 on Feb. 7, 2001). Also on January 10, 2001, Messrs. Kern W. Schumacher and Morris H. Kulmer (Applicants) filed a notice of exemption under 49 CFR 1180.2(d)(2) to allow them to continue in control of SF&L after it becomes a rail carrier. Kern W. Schumacher and Morris H. Kulmer–Continuance in Control Exemption–SF&L Railway, Inc., STB Finance Docket No. 33996 (STB served and published at 66 FR 9410 on Feb. 7, 2001).

¹ These proceedings are not consolidated; they are being considered together for administrative convenience.

Keokuk Junction Railway (KJRY),² on March 7, 2001, filed a petition to reopen and revoke the notices of exemption (Petition) along with a motion for a protective order and a first set of interrogatories, requests to produce, and requests for admissions.³ On March 20, 2001, SF&L and Applicants filed a motion to strike certain letters and related discussion in KJRY's Petition and a motion for a protective order responsive to KJRY's discovery requests. On March 23, 2001, KJRY filed a reply and a motion to compel discovery responses, which it states were due on March 22, 2001.

SF&L and Applicants seek to strike (1) the nine letters that formed Attachment A to KJRY's Petition and (2) the discussion based on these letters in the Petition at pages 5 and 24-25. The letters, written by affected shippers and governmental entities, were submitted to the Board in support of KJRY's Petition. Additionally, SF&L and Applicants seek to strike (1) five letters in Attachment B to KJRY's Petition and (2) the discussion based on those letters in the Petition at pages 14 and 17. These letters generally relate to Applicants' identity and activities as reflected in previous abandonment proceedings before the Board and its predecessor, the Interstate Commerce Commission. Pointing out that none of the letters is verified as required under 49 CFR 1112.8, SF&L and Applicants contend that they should be removed from the record or placed in the correspondence section of the dockets and that the related discussion should be stricken.

The motion to strike will be denied. The Board's verification rules apply only to pleadings and verified statements. Letters and other unverified materials accompanying, or submitted in support of, pleadings are routinely accepted into the record. The absence of verification goes to the weight accorded them and not to their admissibility.

In their motion for a protective order, SF&L and Applicants state that discovery is not available in exemption proceedings such as these, assertedly because exemption proceedings are

² KJRY, a Class III rail carrier controlled by Pioneer Railcorp, see Pioneer Railcorp.—Acquisition of Control Exemption—Knreco, Inc. d/b/a Keokuk Junction Ry., Finance Docket No. 32877 (STB served Mar. 26, 1997), operates a 38-mile line of railroad between Keokuk, IA, and La Harpe and Warsaw, IL. KJRY states that it can interchange traffic with The Burlington Northern and Santa Fe Railway Company at Keokuk but that it is dependent on its connection with TPW at La Harpe for access to other Class I railroads (Union Pacific Railroad Company, Canadian National Railway Company/Illinois Central Railroad Company, Canadian Pacific Railway Company/Soo Line Railroad Company, Norfolk Southern Railway Company, and CSX Transportation, Inc.) and nine shortline and regional railroads.

³ Another decision being served today in these proceedings grants KJRY's motion for a protective order. That decision also grants a motion for a protective order filed by Applicants in connection with a 2-page "confidential" letter submitted with their notice of exemption in STB Finance Docket No. 33996.

informal and, as such, do not qualify for discovery under 49 CFR 1114.21.⁴ To the contrary, the Board's regulations at 49 CFR 1121.2 explicitly provide for discovery in connection with petitions to revoke exemptions. Section 1121.2 lays out the general procedures that apply and otherwise states that the specific procedures of 49 CFR 1114 are to apply.⁵ See Expedited Procedures for Processing Rail Rate, 1 S.T.B. 754, 772 (1996). While SF&L and Applicants correctly observe that exemption proceedings are characterized as informal in 49 CFR 1121.4, that section only refers to the initial consideration of exemption requests and related public comments. SF&L's and Applicants' motion for a protective order will be denied.

KJRY's discovery request seeks information underlying the purchase transaction between SF&L and TPW and extends to traffic and salvage projections, market studies, and profit analyses. In its motion to compel discovery, KJRY responds to SF&L's and Applicants' motion for a protective order and requests that the supplement to its Petition, which it allegedly intends to file, see supra note 5, not be due until 15 days after SF&L and Applicants fully respond to its outstanding discovery requests. KJRY's discovery request appears to be reasonably designed to elicit relevant information, and, aside from SF&L's and Applicants' motion for a protective order, it is not opposed. Accordingly, KJRY's motion to compel discovery responses will be granted. Additionally, because the time period for supplementing petitions to revoke is likely to expire before its discovery is completed, KJRY's request to extend that filing date will also be granted.

It is ordered:

⁴ Section 1114.21(a)(1) provides as follows:

Parties may obtain discovery under this subpart regarding any matter, not privileged, which is relevant to the subject matter involved in a proceeding other than an informal proceeding. For the purpose of this subchapter, informal proceedings are those not required to be determined on the record after hearing and include informal complaints and all proceedings assigned for initial disposition to employee boards under section 1011.6.

⁵ Section 1121.2 provides as follows:

Discovery shall follow the procedures set forth at 49 CFR part 1114, Subpart B. Discovery may begin upon the filing of the petition for exemption or petition for revocation of an exemption. In petitions to revoke an exemption, a party must indicate in the petition whether it is seeking discovery. If it is, the party must file its discovery requests at the same time it files its petition to revoke. Discovery shall be completed 30 days after the petition to revoke is filed. The party seeking discovery may supplement its petition to revoke 45 days after the petition is filed. Replies to the supplemental petition are due 15 days after the supplemental petition is filed.

1. SF&L's and Applicants' motion to strike and motion for a protective order are denied.
2. KJRY's motion to compel discovery responses and request to extend the date to supplement its Petition are granted. SF&L and Applicants shall respond to KJRY's first set of discovery requests within 15 days of the service date of this decision, and KJRY's request for an additional 15 days from the time its discovery is completed to supplement its Petition is granted.
3. This decision is effective on the date of service.

By the Board, Vernon A. Williams, Secretary.

Vernon A. Williams
Secretary